

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

ePLUS INC.,)	
)	
Plaintiff,)	Civil Action No. 3:09-CV-620 (REP)
)	
v.)	
)	
LAWSON SOFTWARE, INC.,)	
)	
)	
)	
Defendant.)	

**DECLARATION OF SRIKANTH K. REDDY IN SUPPORT OF ePLUS INC.'S
OPPOSITION TO LAWSON'S MOTION TO STRIKE THE EXPERT OPINIONS OF
DR. KEITH UGONE**

I, Srikanth K. Reddy, declare as follows:

1. I am an associate at Goodwin Procter LLP, counsel for Plaintiff ePlus Inc. ("ePlus") in this proceeding. I submit this declaration in support of ePlus Inc.'s Opposition to Lawson's Motion to Strike the Expert Opinions of Dr. Keith Ugone.
2. I have personal knowledge of the facts stated herein and, if called as a witness, could and would testify competently hereto.
3. Attached as Exhibit 1 is a true and accurate copy of *Broadcom Corp. v. Qualcomm Inc.*, Case No 05-cv-467, slip op. at 22-27 (N.D. Cal. Aug. 28, 2008)
4. Attached as Exhibit 2 is a true and accurate copy of excerpts from the transcript of the phone conference held in this matter on August 10, 2010 (Dkt. No.409).

5. Attached as Exhibit 3 is a true and accurate copy of excerpts from the transcript of the Evidentiary Hearing held in this matter on March 25, 2010 (Dkt. No.637).

6. Attached as Exhibit 4 is a true and accurate copy of excerpts from the confidential transcript of the deposition of Kurt Reasoner, dated January 9, 2012 (filed under seal).

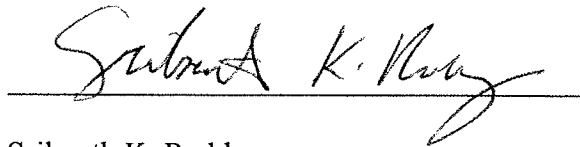
7. Attached as Exhibit 5 is a true and accurate copy of excerpts from the confidential transcript of the deposition of Dale Christopherson, dated October 19, 2009 (filed under seal).

8. Attached as Exhibit 6 is a true and accurate copy of a confidential document produced by Defendant in this matter under Bates numbers RQC2115799 through RQC2115832 (filed under seal).

9. Attached as Exhibit 7 is a true and accurate copy of Defendant Lawson Software, Inc.'s Rule 26 Supplemental Disclosure Concerning Injunctive Relief and Evidentiary Hearing, dated February 14, 2012.

10. Attached as Exhibit 8 is a true and accurate copy of the confidential Exhibit 10 to the transcript of the deposition of Keith R. Ugone, Ph.D., dated February 20, 2012 (filed under seal).

I declare under penalty of perjury that the foregoing is true and correct. Executed at Boston, Massachusetts, this 22th day of February, 2012.

A handwritten signature in black ink, appearing to read "Srikanth K. Reddy", is written over a horizontal line.

Srikanth K. Reddy

EXHIBIT 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO: SACV 05-467 JVS(RNBx)

BROADCOM CORPORATION ,
Plaintiff,

ORDER RE
MOTION FOR CONTEMPT

v.

QUALCOMM INCORPORATED,
Defendant.

On May 13, 2008, upon Application by Broadcom Corporation ("Broadcom"), the Court ordered Qualcomm Incorporated ("Qualcomm") to show cause why it should not be held in contempt for failing to comply with portions of the Permanent Injunction, entered December 31, 2007, as amended by the Court's subsequent orders. (Docket Nos. 995, 1072, 1183.)¹ Specifically, the Court directed Qualcomm to show cause why it should not be held in contempt for failing

¹Unless otherwise indicated, all references herein to the Permanent Injunction are to the Second Amended and Restated Permanent Injunction, entered March 11, 2008, Docket No. 1183.

1 to comply with the '686 injunction,² the '010 injunction,³ and the reporting
2 requirements. (Order Granting in Part and Denying in Part Broadcom
3 Corporation's Application for Order to Show Cause re Contempt of Permanent
4 Injunction, §§ I-III, VIII.) The Court also ordered limited discovery.

5
6 Having considered the parties' further briefing and oral argument, the Court
7 now enters its ruling, granting the Motion in part, denying the Motion in part, and
8 ordering further proceedings.

9
10 I. Legal Standards.

11
12 The parties are in agreement concerning the basic principles which govern
13 this Motion, and they need be recited only briefly.

14
15 The Ninth Circuit has summarized this Circuit's law of contempt in In re
16 Dual-Deck Video Cassette Recorder Antitrust Litigation, 10 F.3d 693, 95 (9th Cir.
17 1993):

18 Civil contempt in this context consists of a party's disobedience to a specific
19 and definite court order by failure to take all reasonable steps within the
20 party's power to comply. The contempt need not be willful, and there is no
21 good faith exception to the requirement of obedience to a court order. But a
22 person should not be held in contempt if his action appears to be based on a
23 good faith and reasonable interpretation of the [court's order]. Substantial
24 compliance with the court order is a defense to civil contempt, and is not

25
26 ²U.S. Patent No. 6,847,686.

27 ³U.S. Patent No. 6,389,010.

1 vitiated by a few technical violations where every reasonable effort has been
2 made to comply.

3
4 (Internal citations and quotation marks deleted; emphasis supplied.) Having
5 initiated this proceeding, Broadcom bears the burden of proving contempt by clear
6 and convincing evidence. Id.; KSM Fastening Systems, Inc. v. H.A. Jones Co.,
7 Inc., 776 F.2d 1522, 1524 (Fed. Cir. 1985).

8
9 Substantive principles of patent law also come into play, particularly the
10 doctrine of implied license. A patentee who has been fully compensated for the
11 infringer's wrongful conduct has, as a matter of law, granted a license for
12 continued use:

13 A patentee, in demanding and receiving full compensation for the wrongful
14 use of his invention in devices made and sold by a manufacturer adopts the
15 sales as though made by himself, and therefore necessarily licenses the use
16 of the devices, and frees them from the monopoly of the patent. This license
17 continues during the life of the machine; it does not end when repairs
18 become necessary.

19
20 Union Tool Co. v. Wilson, 259 U.S. 107, 113 (1922) (emphasis supplied); King
21 Instrument Corp. v. Otari Corp., 814 F.2d 1560, 1564 (Fed. Cir. 1987).

22
23 II. The '686 Patent.

24
25 A. Scope of the '686 Injunction.

26
27 The jury found that Qualcomm infringed the '686 patent, and awarded
28

1 \$11,187,194 in damages. Certain of the infringing products could be used on
2 WCDMA networks, certain could be used on CDMA 1x/EV-DO ("CDMA")
3 networks. In crafting the '686 injunction, the Court carefully considered the
4 differences between the market for chips in both environments, including
5 competition and the availability of competitive alternatives. (Memorandum of
6 Decision re Injunctive Relief, p. 19, Docket No. 996 ["Injunction Memo"].) Those
7 considerations caused the Court to adopt a sunset provision for CDMA uses but not
8 WCDMA uses. The Court stayed the Injunction for CDMA uses:

9
10 PROVIDED, . . . that with respect to '686 Infringing Products (i) capable of
11 operating on a CDMA2000 1xEV-DO network, (ii) which were on sale in or
12 imported into the United States on or before May 29, 2007,⁴ and (iii) with
13 regard only to existing or prior customers of '686 Infringing Products as of
14 May 29, 2007 (which status shall be determined separately with respect to
15 each '686 Infringing Product), the injunction against activities listed in
16 paragraphs (a) and (b) above shall be stayed until January 31, 2009, so long
17 as:

18 (a) Qualcomm pays to Broadcom an ongoing royalty, consisting of 6% of
19 all revenues received by Qualcomm for sales occurring after May 29, 2007
20 of '686 Infringing Products that are sold in or imported into the United
21 States;

22
23
24 ⁴Footnote 1 in original: With respect to each '686, '317, and '010 Infringing Product,
25 such Infringing Product shall deemed to have been sold or imported into the United States if the
26 sale resulted in an intermediate delivery outside the United States for purposes of manufacture,
27 modification, incorporation into another device, or for like purposes, so long as the ultimate
28 purpose of the transaction was for sale or importation of the Infringing Product into the United
States.

1 (Permanent Injunction, § I, Proviso.) Broadcom asserts that Qualcomm has
2 violated the injunction in multiple contexts with regard to its sale and other
3 practices surrounding chips for WCDMA, for convenience “WCDMA sales.”
4 Thus the first question is the effect of the Injunction on WCDMA sales.

5
6 Broadcom takes the position that the Injunction provides no sunset
7 protection for WCDMA sales subsequent to December 31, 2007, the date of the
8 Injunction. Qualcomm does not directly dispute this, but takes a different and
9 expansive view on the theory that subparagraph (a) requires it to pay a sunset
10 royalty on all “‘686 Infringing Products,” including WCDMA Infringing Products,
11 in order to avail itself of the CDMA sunset provision. But Qualcomm does not
12 stop there: It argues that having paid a royalty on such WCDMA Infringing
13 Products, it is entitled to the benefit of an implied license. Qualcomm’s reading is
14 mistaken for several reasons.

15 Had the Court intended to grant a sunset provision for WCDMA Infringing
16 Products, it would have done so directly and expressly. Clearly, the sunset
17 provision, as quoted above, is for CDMA chips only. Moreover, Qualcomm’s
18 reading is directly contrary to the Court’s express rationale for not adopting a
19 sunset provision for WCDMA products: The Court intended to free Broadcom
20 from head-to-head competition with Qualcomm using Broadcom’s patented
21 technology. Thus the Court enjoined sales of those ‘686 chips in the market where
22 Qualcomm and Broadcom compete. (Injunction Memo, pp. 17-19.)

23
24 In the full context of ‘686 injunction, it is plain that the royalty provision
25 refers to “Infringing ‘686 Products” which meet the further requirement that they
26 serve CDMA networks. Qualcomm enjoys neither the right nor does it have the
27 obligation to pay a royalty on WCDMA products sold after May 29, 2007.

1 Qualcomm is ordered to revise and resubmit the April 14, 2008 royalty report
2 accordingly.

3
4 At oral argument, Qualcomm asserted that during the meet-and-confer
5 process leading to a motion to clarify the original Injunction, Broadcom had
6 conceded that upon payment of royalties on WCDMA sales during the period
7 between the jury's verdict, May 29, 2007, and the entry of the Injunction,
8 December 31, 2007 (the "Window"), Qualcomm would have the right to support
9 such WCDMA sales. Broadcom denied such agreement, and none is memorialized
10 in the pleadings or otherwise. However, both parties asserted that their views were
11 reflected in the subsequent briefing on the motion for clarification (Docket No.
12 1049). The Court invited limited additional letter briefs on the issue.

13
14 The original Injunction contained no express discussion of Qualcomm's
15 right to support infringing chips. Among the clarifications adopted in the
16 Amended and Restated Permanent Injunction, entered February 5, 2008 (Docket
17 No. 1072), was a new Section VI entitled "Permissible Technical Support":

18 Nothing in this Amended and Restated Permanent Injunction shall prohibit
19 the Qualcomm Parties from providing service or technical support, including
20 without limitation software debugging, for a '686, '317, or '010 Infringing
21 Product for which Broadcom has been compensated under the jury's Verdict
22 or for which Qualcomm is obligated to and makes a timely royalty payments
23 in accordance with the sunset provisions in Section I, II, and III, supra.⁵
24

25
26 ⁵The provision in the currently operative Second Amended and Restated Permanent
27 Injunction is identical except for insertion of the word "Second" in the first line. (Permanent
28 Injunction, § VI, Docket No. 1183.)

1 (Amended and Restated Permanent Injunction, Section VI; emphasis supplied.)
2 Qualcomm argues that because it was obligated to pay royalties on WCDMA chip
3 sales during the Window, the new provision permits it to support those chips. But
4 that is the flaw. As discussed above, no such royalty obligation exists. Moreover,
5 during the briefing on the motion for clarification, Qualcomm realized that the
6 above formulation would potentially leave some infringing chip sales without
7 support: “Qualcomm opposes Broadcom’s proposed modification because the
8 wording suggests there may be a subset of Qualcomm production that are not
9 entitled to technical support.” (Qualcomm Corporation’s Opposition to
10 Broadcom’s Newly Proposed Modification to the Court’s Injunction, p. 12.) The
11 language which Broadcom had proposed is substantially similar to the language
12 which the Court adopted.⁶ At oral argument, the most favorable gloss Qualcomm
13 could put on the provision was that it “doesn’t speak to WCDMA one way or
14 another.” (Transcript, July 21, 2008, p. 41 [“Tr.”].)

15 Admittedly, the Court’s ruling leaves a lacuna in the relief granted under the
16 ‘686 Patent. The jury awarded damages through the date of verdict, May 29, 2007;
17 the Court enjoined sales of WCDMA Infringing Products on December 31, 2007.
18 Neither form of relief addresses sales for WCDMA Infringing Products during the
19 Window. However, such sales were clearly infringing, and by virtue of the verdict,
20 Qualcomm was on notice. The Court leaves to Broadcom whether and how this
21 lacuna should be filled. It declines to put that choice in Qualcomm’s hands to

22
23 _____
24 ⁶Broadcom proposed:

25 Nothing in this Permanent Injunction shall prohibit the Qualcomm Parties from
26 providing service or technical support for any Infringing Product for which
Qualcomm has paid damages or for which Qualcomm has paid or intends to pay a
royalty as permitted by this Injunction.

27 (Broadcom Corporation’s Proposed Clarifications to the Court’s Permanent Injunction, p. 6.)
28

1 make a unilateral decision.

2
3 Obviously, Qualcomm could not have been on notice of the Court's
4 Injunction between the date of verdict and the entry of the Injunction. Thus, for
5 contempt purposes, the Court evaluates its conduct with regard to WCDMA
6 Infringing Products subsequent to December 31, 2007.

7
8 B. Qualcomm's Activities in Contempt of the '686 Injunction.

9
10 The Court enjoined Qualcomm from:

11 making, using, importing, selling, and/or offering to sell in the United States
12 the MSM6275, MSM6280, MSM6550, MSM6800, MSM7200, MSM7500,
13 and MSM7600 baseband chips, or any device not more than colorably
14 different therefrom (collectively, the "'686 Infringing Products"), or any
15 device that includes any '686 Infringing Product (including, without
16 limitation, cellular telephone handsets, Form Factor Accurate ("FFA")
17 devices, and Subscriber Unit Reference ("SURF") devices);

18
19 (Permanent Injunction, § I(a).) In their showings on this Motion, the parties parse
20 each of these activities.

21
22 Qualcomm offers two basic defenses for its conduct with regard to WCDMA
23 sales after December 31, 2007. First, a portion of its activities were carried out
24 under its agreement with Verizon. The parties have agreed that such activities
25 carried out under the license which Broadcom granted to Verizon are not
26 infringing. (Joint Stipulation Regarding Licensing Agreement and Order Thereon,
27 Feb. 5, 2008, Docket No. 1002.) Second, by virtue of its payment of (1) damages

1 through May 29, 2007 under the verdict, and (2) its payment of royalties from the
2 date of the verdict through March 31, 2008, and a purported continuing obligation
3 to pay royalties, Qualcomm contends that it has an implied license. For the reasons
4 stated above, the Court rejects the second component of the implied license
5 defense. Qualcomm is entitled to an implied license only with respect to WCDMA
6 sales for which damages were assessed under the verdict.

7
8 The Court now considers the list of activities specifically challenged by
9 Broadcom.

10
11 1. Sales Prior to December 31, 2007.

12
13 Qualcomm concedes that sales of WCDMA Infringing Products were made
14 in the Window which were subsequently imported into the United States. The
15 Court finds no contempt, because, by definition Qualcomm was not on notice of
16 the Permanent Injunction.

17
18 Additionally, the Court finds that sales of WCDMA Infringing Products for
19 Verizon products are permitted under the Permanent Injunction, and do not
20 constitute a contempt.⁷

21 2. Customer Support.

22
23 The analysis breaks into three parts.

24
25
26 ⁷The same is true with regard to support and all other activities covered by the Verizon
27 Agreement which would otherwise amount to actionable infringement. For that reason, the
28 Court will not discuss those activities in the balance of the Order unless otherwise relevant.

1 First, with respect to sales of WCDMA Infringing Products for which
2 damages were awarded under the verdict, Qualcomm is entitled to provide those
3 specific customers on-going support with respect to those specific purchases.
4 King Instrument Corp., 814 F.2d at 1564. The Court refers to these and other
5 activities and uses permitted by virtue of the verdict as "Licensed Activities."

6
7 Second, the Court finds no contempt for support provided in the Window for
8 WCDMA Infringing Products sold during the Window.

9
10 Third, the Court finds that Qualcomm violated the '686 injunction when it
11 provided support after December 31, 2007 for WCDMA Infringing Products,
12 except for Licensed Activities. On the present record, the Court cannot define the
13 full extent of such violations.

14 Because Qualcomm's interpretation of the '686 sunset provision is not
15 reasonable, the Court finds by clear and convincing evidence that its support
16 activities after December 31, 2007, other than Licensed Activities, constitute
17 contempt.

18
19 3. Employee Use of Paid-For WCDMA Phones.
20

21 The same three-part analysis applied to customer support, above, is equally
22 applicable to Qualcomm employee use of WCDMA phones.

23
24 On the present record, the Court cannot define the full extent of such
25 violations subsequent to December 31, 2007.

26
27 Because Qualcomm's interpretation of the '686 sunset provision is not
28

1 reasonable, the Court finds by clear and convincing evidence that its employee use
2 of WCDMA phones after December 1, 2007, other than Licensed Activities,
3 constitutes contempt.

4
5 4. Selling WCDMA SURFs.

6
7 Qualcomm concedes that after the Injunction it sold a SURF with a socket,
8 or socket SURF, that could accommodate one of the WCDMA Infringing Products,
9 but argues that the unit was shipped with an empty socket. (Qualcomm Memo, p.
10 16.) The SURF is not the patented product, nor is it component of a patented
11 product—i.e., the broadband chip. The Court thus finds that Qualcomm is correct
12 when it argues that the provisions of 35 U.S.C. § 271(f) are inapplicable.⁸

13 This conduct does not constitute contempt.

14
15 Next, the Court considers whether Qualcomm has complied with the
16 remaining generic portions of the Injunction.⁹

17
18 1. Making.

19
20 The Court is satisfied that all manufacturing activities for broadband chips
21 take place outside the United States, and thus the activity is not covered by the
22 Permanent Injunction. (Permanent Injunction, § IV.)

23
24
25 ⁸This assumes that Broadcom asserted a Section 271(f) claim for the '686 Patent. (See
26 Tr. 75.)

27 ⁹"[M]aking, using, importing, selling, and/or offering to sell in the United States."
(Permanent Injunction, ¶ 1(a).)

1 Qualcomm asserts that all manufacture of SURFs or FFAs containing
2 WCDMA Infringing Products has been carried out directly or indirectly as part of
3 the Verizon arrangement. It does acknowledge other manufacturing which it
4 asserts is outside the Injunction: including a “socketed SURF” (MSM7200A);
5 versions of the MSM 6290 with the texture engine (“TE”) function disabled or the
6 fuse blown; and MSM 7225 chips with the TE function disabled.

7
8 The Court finds no violation of the Injunction.

9
10 2. Chip Use.

11
12 Qualcomm asserts that it has used chips for testing only to support Verizon,
13 to support its development of TE-disabled design-around chips,¹⁰ or for uses of
14 chips with the video fuse blown.

15 Use of chips in third-party devices is subject to the three-part analysis
16 discussed above. On the present record, the Court cannot define the full extent of
17 such violations subsequent to December 31, 2007.

18
19 Qualcomm asserts that it prohibits the use of SURFs/FFAs unless permitted
20 under the Verizon arrangement in a use exclusively for Verizon’s benefit.

21
22 3. Importing.

23
24 Qualcomm asserts that it has imported WCDMA Infringing Products only
25 for four purposes: (1) to modify on importation to render non-infringing by
26

27 ¹⁰See discussion of design-arounds in Section VI.A, infra.

1 disabling the TE function; (2) to modify on importation to render non-infringing by
2 blowing the video fuse; (3) for destruction upon importation; and (4) for Verizon
3 activities. All of these uses are permitted under the Permanent Injunction.
4 (Permanent Injunction, §§ V, VII.)¹¹

5
6 Qualcomm has outlined its screening procedures for shipments coming via
7 courier and freight forwarder to ensure importation only for a permitted purpose.
8 The Court finds that those procedures are reasonable and constitute substantial
9 compliance.

10
11 Broadcom has not shown by clear and convincing evidence that
12 Qualcomm's importation activities constitute a contempt.

13
14 4. Selling.

15
16 *Broadband Chips.*

17
18 Qualcomm admits that it has sold WCDMA Infringing Products in 2008 in
19 violation of the Permanent Injunction. (Qualcomm Memo, pp. 27-28.) The parties
20 describe these sales differently, but they amount to slightly more than 1000 chips,
21 of three different models, made to four customers.¹² Qualcomm asserts that the
22 chips were samples, and that it received revenue for only two sales (\$18,508.65.)

23 ¹¹"Nothing in this Second Amended and Restated Permanent Injunction shall prohibit the
24 Qualcomm Parties from importing into the United States any '686 Infringing Product, '317
25 Infringing Product, or '010 Infringing Product solely for the purpose of engaging in design,
development, or testing so as to eliminate infringement and/or effecting modification to
eliminate infringement." (Permanent Injunction, § V.)

26
27 ¹²Qualcomm describes fourteen shipments (Qualcomm Memo, p. 28); Broadcom
describes seven shipments (Broadcom Opp., p. 7).

1 Qualcomm explains that certain customers with research, but not
2 manufacturing, facilities in the United States were taken off “hold” which allowed
3 WCDMA Infringing Products to be sold and shipped to them. Qualcomm
4 contends that it has modified its shipment compliance procedures in light of this
5 error. In its reply, Qualcomm also points to the remedial steps it has taken to
6 procure the return of these chips or assurances that chips from foreign sales will
7 not be imported for use in the United States. (Qualcomm Reply, p. 2.)

8
9 The Court finds substantial compliance in light of the remedial steps taken to
10 resolve the initial internal systems defect and the efforts to secure return of the
11 chips. In the overall analysis, the number of chips is inconsequential, particularly
12 when spread over four customers and several types of chips.

13 *SURFs/FFAs.*

14
15 Broadcom asserts that since December 31, 2007, Qualcomm has sold over
16 2,000 SURFs/FFAs in models MSM 6290, MSM7225, MSM7600, and MSM7601.
17 The combination of Darin Tripi’s deposition testimony and declaration provide a
18 sufficient explanation with regard to the first two products. He testified that none
19 of the MSM6290 and MSM7225 products could be used for video encoding. (Ex.
20 18, pp. 47-48, 51, 142-147 [Tripi].) Similarly, the MSM7601 product cannot be
21 used for video encoding. (Roy Decl., ¶ 13.) The remaining device, the MSM7600,
22 was sold to Research in Motion whose only customer is Verizon. (Ex. 7, p. 28
23 [Roy].)

24
25 Broadcom has not offered clear and convincing evidence of contempt.

26
27 5. Offering to Sell.

1 Qualcomm describes a compliance program for issuing quotations for
2 WCDMA Infringing Products only through foreign regional offices for delivery to
3 customers outside the United States. However, Qualcomm concedes that some
4 quotations issued after December 31, 2007 were sent to United States addresses.
5 (Qualcomm Memo, p. 30.)

6
7 Through discovery, Broadcom has documented that such offers were made
8 to LG International America, Samsung Electronic America, Kyocera Wireless,
9 Motorola, Inc., Novatel Wireless, Palm, Inc., and AnyData Corporation.
10 (Broadcom Opp., pp. 9-11.) The number of offers and quoted volumes convinces
11 the Court that Qualcomm failed to take all reasonable steps to comply with the
12 Injunction against “offering to sell in the United States.” (Permanent Injunction, §
13 I(a).)

14
15 The Court finds that these offers are likely contempts in violation of the
16 Permanent Injunction. The Court finds that it is sufficient that the offers were
17 made in the United States. Wesley Jessen Corp. v. Bausch & Lomb, Inc. 256
18 F.Supp. 2d 228, 233-34 (D. Del. 2003); SEB, S.A. v. Montgomery Ward & Co.,
19 Inc., 412 F.Supp. 2d 336 341-43 (S.D. N.Y. 2006). This result is implicitly
20 consistent with the Federal Circuit’s treatment of the issue in Rotec Industries, Inc.
21 v. Mitsubishi Corp., 215 F.3d 1246, 1258 (Fed. Cir. 2000) (Newman, J.,
22 concurring).

23
24 Qualcomm official Leonard Territo (“Territo”) was unclear at deposition
25 whether actual sales had resulted from any of these offers. However, in his
26 declaration, Territo asserts that Qualcomm’s shipment histories indicate that no
27
28

1 shipments were made to the United States in response to any of the quotes.¹³
2 (Territo Decl., ¶ 7.)
3

4 Qualcomm apparently offered to produce the purchase orders related to the
5 quotations, but then declined to do so. Before coming to a final conclusion on the
6 legal and factual issues raised by the offers, the Court believes further discovery
7 should be made to Broadcom. The Court orders production of all such purchase
8 orders.
9

10 6. Technical Support.
11

12 Qualcomm indicates that it has responded to more than 54,000 requests for
13 technical support in the past year with regard to Infringing WCDMA Products, but
14 that such response have been limited to Verizon and "downstream customers" who
15 purchased the relevant chips prior to December 31, 2007.

16 For reasons discussed above, support for WCDMA Infringing Products sold
17 during the Window and rendered after December 31, 2007 violates the Permanent
18 Injunction, and constitutes a contempt. On the present record, the Court cannot
19 assess the extent of the violations.
20

21 III. The '010 Patent.
22

23 A. Sunset Royalty Payments.
24

25 ¹³Given the high standard of proof on the present motion, the Court accepts Territo's
26 declaration, and declines too parse to finely whether Territo as Qualcomm's rule 30(b)(6)
27 designee took a different position or whether his declaration simply filled in incomplete
28 knowledge. See Diamond Triumph Auto Glass, Inc. v. Safelite Glass Corp., 441 F. Supp. 2d
695, 723 & n. 17 (M.D. Pa. 2006).

1 In the Permanent Injunction, the Court provides a sunset royalty for use of
2 Q-Chat technology under the '010 Patent:

3
4 PROVIDED . . . that with respect to '010 Infringing Products (i) which were
5 on sale in or imported into the United States on or before May 29, 2007,¹⁴
6 and (ii) with regard only to existing or prior customers of '010 Infringing
7 Products as of May 29, 2007 (which status shall be determined separately
8 with respect to each '010 Infringing Product), the injunction against
9 activities listed in paragraphs (a) and (b) above shall be stayed until January
10 31, 2009, so long as:

11
12 (a) Qualcomm pays to Broadcom an ongoing royalty, consisting of 15%
13 of all revenues received by Qualcomm for sales occurring after May 29,
14 2007 of '010 Infringing Products, including revenues received from pre- and
15 post-commercialization development fees and licenses, that are sold in, or
16 imported into, or licensed in the United States.

17 (Permanent Injunction, § III, Proviso.) This provision evolved in several respects
18 from the original Injunction issued on December 31, 2007. First, the Court
19 effectively limited the sunset provision to Q-Chat Version 3.0 by restricting it to
20 “versions of software which had been delivered, accepted, and paid for as of May
21 29, 2007.” (*Id.*, p. 8, n. 7, quoted below in footnote 14.) Second, the Court
22 clarified the types of revenues subject to the royalty payment to include “pre- and
23 post-commercialization development fees and licenses.” (*Id.*, §III, Proviso (a).)
24
25

26 ¹⁴ Footnote 7 in original: With respect to software encompassed within the '010
27 Infringing Products, this sunset provision shall be limited to versions of software which had been
28 delivered, accepted, and paid for as of May 29, 2007.

1 Qualcomm claims that it is not required to avail itself of the '010 sunset
2 provision, contends that it has not done so, and has made no royalty payments.

3
4 For the reasons set forth below, the Court finds by clear and convincing
5 evidence that Qualcomm is in contempt.

6
7 As Broadcom documents, Qualcomm has received more than \$93 million in
8 Q-Chat-related payments from Sprint since the date of the verdict. (Broadcom
9 Opp., pp. 33-36; Ex. 24.)

10
11 Qualcomm's principal defense is that Broadcom received full compensation
12 under the verdict, and thus is not entitled to further compensation in view of the
13 implied license conferred. King Instrument Corp., 814 F.2d at 1564. The Court
14 disagrees. Broadcom could not have presented evidence of future revenues which
15 did not then exist prior to commercialization. Some of the post-commercialization
16 services were not contracted for until after the entry of the Injunction on December
17 31, 2007. (Ex. 75.) Tellingly, even as of the date of recent discovery which the
18 Court allowed on this Motion, Qualcomm officials could still not predict the future
19 revenue flow under the Sprint agreement. (Ex. 52, p. 52 [Vrechek].) The present
20 situation is simply not akin to supplying spare parts for repair. King Instrument
21 Corp., 814 F.2d at 1564.

22 Qualcomm argues that there has been no sale since the verdict, so that the
23 royalty provision does not come into play. Given the Court's revisions to the '010
24 royalty provision to include "revenues received from pre- and post-
25 commercialization development fees and licenses," this linguistic gamut fails.
26 Moreover, the language in footnote 7 to the sunset provision would, under
27 Qualcomm's logic, render the sunset provision a complete nullity from the outset.

1 B. Versions 3.1 and 3.2.

2
3 The record indicates that Qualcomm has received \$17 million in fees from
4 Sprint in connection with follow-on versions. The Permanent Injunction explicitly
5 allows Qualcomm to engage in design-around activities. (Permanent Injunction, §
6 V.) The record does not establish by clear and convincing evidence that
7 Qualcomm has done anything more than permitted activities. (See Ex. 52, pp. 22,
8 24 [Vrechek].)

9
10 While it may be frustrating to Broadcom to be denied the particulars of
11 Qualcomm's Q-Chat design-around efforts (Broadcom Opp., p. 34), the Court
12 agrees with Qualcomm that it has no burden to prove that it is not infringing with
13 its Version 3.1 and 3.2 efforts.

14 IV. Inventory Adjustments.¹⁵

15
16 In its April 14, 2008 initial royalty report, Qualcomm made a one-time \$4.6
17 million so-called inventory adjustment to eliminate double-counting. Such double-
18 counting could result if a product included in Broadcom's damage calculation were
19 counted a second time when subsequently imported into the United States.
20 Broadcom challenges the calculation in several particulars.

21
22 Qualcomm queried two of its largest customers who responded that their
23 inventory lag between sale and importation was 6 weeks and 5.2 weeks.

24
25
26 ¹⁵While the Court agrees in theory with the notion of an inventory adjustment to avoid
27 double counting, the preferable course would have been to air the issue with the Court and
28 Broadcom before Qualcomm made a unilateral determination that it was entitled to a reduction
in the initial royalty payment.

1 Broadcom points out that Samsung, another major customer, reported an inventory
2 lag of 3.2 weeks, although Qualcomm excluded Samsung in its analysis because its
3 response was deemed incomplete. Broadcom also points to testimony of
4 Qualcomm personnel that its inventory analysis would not meet audit standards.
5 On this record, the Court cannot say that the use of 5.2 weeks was unreasonable.

6
7 Broadcom also objects that the adjustment was not tied to chips for which
8 the jury actually awarded damages. Qualcomm's assertion that this would require
9 "some sort of a magic tracer" is colorful, but off the mark. (Qualcomm Br., p. 44.)
10 Broadcom points to three chips used in the inventory adjustment—the MSM6500,
11 MSM 6550A, and MSM6800A—which did not figure in Broadcom's damages, but
12 which nevertheless form a major part of the adjustment calculation. (See Ex. 78.)
13 Broadcom also notes that sales to customers not included in the damage award
14 were nevertheless included in the adjustment. (Broadcom Opp., p. 50.) The Court
15 believes that substantial improvement in the calculation can be achieved even if
16 one accepts that the adjustment is at best an estimate.

17 Within thirty days, Qualcomm is ordered to submit a revised inventory
18 adjustment calculation which is based only on chips included in the damage award
19 which were sold to customers included in the damage award. Any challenge to the
20 revised calculation may be brought by motion within thirty days of service of the
21 revised calculation.

22
23 **V. Identification of Sunset Customers.**
24

25 In crafting the sunset provisions in the Permanent Injunction, the Court gave
26 weight to the reliance Qualcomm's existing customers had placed on the
27 availability of Qualcomm's products, particularly in the CDMA environment. For
28

1 that reason, the Court crafted the sunset provisions to serve only the needs of that
2 set of customers. For example, for the '686 Patent, the Court limited sunset sales
3 "to existing or prior customers of '686 Infringing Products as of May 29, 2007
4 (which status shall be determined separately with respect to each '686 Infringing
5 Product)." (Permanent Injunction, § I, Proviso; see id., p.3 n. 1.) Broadcom
6 contends that Qualcomm has failed to take sufficient measures to ensure sunset
7 sales only to permitted customers.

8
9 The Court cannot say that the steps taken by Qualcomm were not reasonable
10 or do not constitute substantial compliance with the customer set limitation. The
11 Court finds that it is reasonable to aggregate affiliates, reasonable to make a
12 determination on the basis of chip model rather than individual chips, and
13 reasonable to treat the ship/billing date as the date of sale for purposes of the
14 Permanent Injunction.

15
16 The Court cannot fault Qualcomm for taking iterative steps when it
17 concluded that its initial customer identifications contained a loophole. Any
18 shortcomings in the language of the "intent letters" solicited from customers must
19 be weighed against the fact that all customers were supplied a copy of the
20 Permanent Injunction. (Permanent Injunction, § VIII.)

21
22 Broadcom has failed to offer clear and convincing evidence of contempt
23 with respect to sunset customer limitations.¹⁶
24

25
26 ¹⁶Broadcom also asserts that certain revenues were not reported in the April 14, 2008
27 royalty reports. (Broadcom Opp., pp. 45-47.) The Court finds Qualcomm's explanation
28 satisfactory. (Qualcomm Reply, pp. 25-27.) In any event, this does not rise to clear and
convincing evidence of evasion of Qualcomm's royalty obligations.

1 VI. Remedies.

2
3 In a contempt proceeding, the Court has the power to fashion appropriate
4 sanctions. Lasar v. Ford Motor Co., 399 F.3d 1101, 1118 (9th Cir. 2005).

5
6 A. Enjoining the xxx1 Design-Around Chips.

7
8 Broadcom contends that by virtue of its activities in contempt, Qualcomm
9 got an unfair “head-start” in the development of its xxx1 design-around chip with
10 disabled TE function. For this, Broadcom urges the Court to enjoin sale of the
11 chips for a period of six months. The Court declines to do so.

12
13 In the context of developing design-arounds for its products, Qualcomm is
14 entitled to undertake activities which would otherwise violate the Permanent
15 Injunction and amount to actionable continuing infringement:

16
17 Nothing is this Second Amended and Restated Permanent Injunction shall
18 prohibit the Qualcomm Parties from engaging in the design, development, or
19 testing of any product or service which does not infringe the ‘686 Patent, the
20 ‘317 Patent, and/or the ‘010 Patent. Nothing is this Second Amended and
21 Restated Permanent Injunction shall prohibit the Qualcomm Parties from
22 engaging in modification of any ‘686 Infringing Product, ‘317 Infringing
23 Product, or ‘010 Infringing Product so as to eliminate infringement, nor
24 from engaging in design, development, or testing for said purpose. Nothing
25 in this Second Amended and Restated Permanent Injunction shall prohibit
26 the Qualcomm Parties from importing into the United States any ‘686
27 Infringing Product, ‘317 Infringing Product, or ‘010 Infringing Product
28 solely for the purpose of engaging in design, development, or testing so as to

1 eliminate infringement and/or effecting modification to eliminate
2 infringement.
3

4 (Permanent Injunction, § V; emphasis supplied.) Thus, the use of WCDMA
5 Infringing Products is permitted as part of the design-around efforts. The Court
6 does not believe that Broadcom has established by clear and convincing evidence
7 that Qualcomm has used unfair means in developing its xxx1 chips. The objection
8 that Qualcomm may have used WCDMA Infringing Products after Qualcomm
9 developed an initial design ignores the fact that there is substantial testing required
10 at subsequent stages leading to introduction of a successful commercial product.
11 (Peron Reply Decl., ¶¶ 7-10.) Moreover, the use of the WCDMA Infringing
12 Products was not for developing the infringing TE function, but to develop a chip
13 that would operate with that function disabled. The result is a product which lacks
14 the patented feature.

15 Even assuming that Qualcomm used unfair means to develop a non-
16 infringing design-around, the Court would have some reluctance to enjoin a
17 product which does not infringe. The Court does not find Broadcom's analogy to
18 trade secret law convincing. (Broadcom Opp., pp 32-33.) As noted, the Court
19 finds that the predicate for this theory is lacking, and to the extent that the Court
20 has found other contempts with regard to the '686 Patent, they do not warrant this
21 remedy.
22

23 At oral argument, Broadcom stressed that its goal had been to secure an
24 unfettered market opportunity, not monetary relief in the form of royalties for
25 prospective sales of infringing WCDMA chips. (Tr. 20-21.) The most direct way
26 to preserve that opportunity was to enjoin the sales of WCDMA chip after
27 December 31, 2007, which is what the Court did. Whatever may be said for post-
28

1 Injunction support for infringing sales of WCDMA chips made in the Window,
2 those were sale which by definition were lost. The Court believes that support of
3 chips already sold had a secondary effect on Broadcom's ability to compete, and
4 now even that support must cease. With regard to testing, it is hard to see how
5 competition from the xxx1 chips, even if unfairly accelerated, had a significant
6 effect where the Broadcom chip had the TE function and the xxx1 had none. The
7 xxx1 chips cannot supply the patented, competitively advantageous function
8 which Broadcom offers.

9
10 B. '010 Patent Payment.

11
12 Of the contempts which the Court has found, the failure to pay the '010 sun
13 set royalty is the most egregious. As Broadcom contended at oral argument,
14 payment, even with interest, merely requires Qualcomm to do what is should have
15 done in the first place. (Tr. 24.) The Court agrees that there was more than a
16 "failure to pay": so long a Qualcomm did not pay the royalty it was using
17 technoloy it had no right to use. In formulating a remedy, the Court finds the
18 district court's approach in Brine, Inc. v. STX, L.L.C., 367 F.Supp. 2d 61, 71 (D.
19 Mass. 2005), instructive. There the court was searching for the appropriate
20 punishment for a second infringement violation of its injunction, and concluded
21 that gross profit was an appropriate measure. The court considered awarding net
22 profits from the infringing activities, but concluded that gross profits were a better
23 measure for two reasons:

- 24 1. As is recognized in other areas of the law, there are evidentiary
25 difficulties inherent in calculating net profit (i.e. profit after all expenses,
26 depreciation and tax). Given such uncertainty, there is increased risk that the
27 plaintiff will not be made whole. In a contempt proceeding, the need to
28

1 ensure that the plaintiff is fully compensated and that the defendant is
2 deterred, is acute.

3
4 2. While an award of gross profit may overcompensate [the plaintiff] Brine,
5 it will do so in an amount which bears a direct relationship to the degree of
6 infringement: the more X2+s that were sold, the greater the award. As such,
7 a sanction in the amount of gross profit from the sales of the X2+ provides a
8 natural means of imposing a penalty that is proportionate to the severity of
9 the contempt.¹⁷

10 (Id. at 71; citation deleted; emphasis supplied.) One could argue that contempt
11 here is different, in that Qualcomm did not engage in infringing conduct but simply
12 failed to pay. But so long as Qualcomm failed to pay it was in fact infringing.
13 Moreover, the Court regards the egregiousness of the conduct here of similar
14 caliber to the contempt in Brine.¹⁸

15
16 Within thirty days, Qualcomm shall render under oath an accounting of all
17 post-verdict Q-Chat payments related to Version 3.0 received from Sprint from
18 May 29, 2007 through the date of this order and present calculation of its gross
19 profit on such revenues. (Permanent Injunction, § VIII.) With respect to North
20

21 ¹⁷In view of this monetary award which can be measured with respect to the conduct in
22 contempt, the Court deletes from this Order provisions in its Tentative Minute Order imposing a
23 surcharge on the award of attorney's fees. (Tentative Minute Order re Motion for Contempt, p.
24 18 ("The Court imposes a fifty percent surcharge on the award of attorney's fees and costs by
25 way of monetary sanction for Qualcomm's contempts. The Court has no convenient way to
26 assess the economic impact of Qualcomm's contempts, and a measure based on attorney's fees
27 and costs is at least related to the burdens which Broadcom undertook by initiating this
28 proceeding."))

¹⁸Disgorgement of Qualcomm's unjust gain is not punitive; it merely transfers that gain
to the party harmed by its conduct.

1 American Exclusivity payments, Qualcomm shall make a proration to include that
2 portion of the payments reasonably attributable to the United States and shall state
3 the basis for the proration. Within the same thirty days, Qualcomm shall pay
4 Broadcom the calculated gross profits. The amount shown in the accounting shall
5 be paid without regard to any challenge of the accuracy of the accounting; any such
6 dispute shall be resolved by the Court, but shall not delay payment.¹⁹ The payment
7 shall satisfy Qualcomm's royalty obligation under the '010 sunset provision
8 through the date of this Order.

9
10 Should Qualcomm fail to make the accounting and payment as provided in
11 this Order, the sunset provision for the '010 Patent shall automatically lapse, and
12 shall only be reinstated upon further application to the Court by Qualcomm.

13
14 C. Suspension of Sunset Provisions.

15 The Court declines to suspend the sunset provisions for the '686 and '317
16 Patents.²⁰ Such a course would ignore the public interest aspects which figured
17 prominently in the Court's decision to adopt sunset provisions in the first place.
18 (Injunction Memo, pp. 8-9, 17-18.) With regard to the '010, the Court has set
19 suspension as the penalty for failure to comply with royalty obligations ordered
20 here.

21
22 D. Attorney's Fees.

23
24
25
26 ¹⁹Upon appropriate application, the Court would consider allowing Broadcom to test the
calculation by way of a Rule 30(b)(6) deposition and supporting request for production.

27 ²⁰U.S. Patent No. 6,657,317.

1 An award of attorney's fees is a customary remedy in favor of a party who
2 has successfully mounted a contempt proceeding. Perry v. O'Donnell, 759 F.2d
3 702, 704 (9th Cir. 1985). If Broadcom prevailed on no other portions of its claims
4 than those related to WCDMA Infringing Products after December 31, 2007 and
5 the failure to pay '010 sunset royalties, it would be the substantial victor here.

6
7 The Court has no doubt that litigating this contempt proceeding has been a
8 substantial expense for both sides. Qualcomm's attorney's fees are a penalty
9 which it must bear. Qualcomm must also pay Broadcom's reasonable attorney's
10 fees and expenses.

11
12 Within thirty days, Broadcom shall present its application for reasonable
13 attorney's fees and costs. The application shall be in sufficient detail for the Court
14 to make the usual lodestar analysis. See Hanlon v. Chrysler Corp., 150 F.3d 1011,
15 1029 (9th Cir. 1998). Within twenty days thereafter, Qualcomm may file any
16 objections. Should the Court determine that a hearing would be useful, the Court
17 will schedule one.

18 VII. Reporting Requirements.
19

20 Under the Permanent Injunction, each sunset provision carries a similar
21 reporting requirement. Qualcomm must provide "periodic reports from which
22 Broadcom can assess the proper royalties owed, detailing at least the volume of,
23 and revenue derived by Qualcomm from, any post-May 29, 2007 sales of" the
24 relevant Infringing Products. (E.g. Permanent Injunction, § I, Proviso § (b).) The
25 sunset provisions permit sales and require royalty payment only on sales made to
26 customers as of May 29, 2007 for products which the customer purchased prior to
27 that date. (E.g., id., § I, Proviso.) Without the latter information for sales, one
28

1 cannot determine whether Qualcomm is paying the “proper royalty.”

2
3 In its April 14, 2008 report, Qualcomm did not provide detail by customer
4 and the chip purchased by the customer. Qualcomm did provide such detailed
5 information as part of the limited discovery allowed by the Court on this Motion.
6 (Order Granting in Part Broadcom’s Application for Order to Show Cause re
7 Contempt of Permanent Injunction, ¶ 3(a)-(e); see Qualcomm Opening Br., p. 40.)

8
9 While the Court cannot say that Qualcomm’s report constituted substantial
10 compliance, neither can it say that a contempt has been proved by clear and
11 convincing evidence. Henceforth, Qualcomm shall support its periodic royalty
12 reports with same level of detail subsequently provided for the April 14, 2008
13 report. With respect to the report for the second quarter of 2008, Qualcomm shall
14 provide such information within thirty days.

15 **VIII. Conclusion.**

16
17 The Court finds that Broadcom has proven by clear and convincing evidence
18 that the following activities by Qualcomm constitute contempt:

- 19
20 • Customer support for WCDMA Infringing Products after December 31,
21 2007, except for Licensed Activities and Verizon support.
22
23 • Employee use of WCDMA phones after December 31, 2007, except for
24 Licensed Activities and Verizon support.
25
26 • Technical support rendered to WCDMA customers after December 31,
27 2007, except for Licensed Activities and Verizon support.
28

- 1 • Failure to pay sunset royalties under the '010 Patent.

2
3 Qualcomm is ordered to cease its contemptuous conduct with regard to the '686
4 injunction immediately if it has not already done so and to comply with this
5 Order's provisions regarding the '010 Patent.

6
7 The Court reserves determination whether Qualcomm should be held in
8 contempt for offering to sell WCDMA Infringing Products in the United States,
9 pending production of invoices for purchases associated with such offers.

10
11 The Court orders Qualcomm to prepare a revision to the April 14, 2008
12 royalty statement within thirty days which:

- 13 • Eliminates payment of royalties of WCDMA Infringing Products.
- 14
- 15 • Includes a revised inventory adjustment limited to product sales covered by
16 the verdict to customers covered by the verdict.
- 17

18 The Court orders Qualcomm to render an accounting of '010 sunset
19 revenues and gross profits and to make the payment described in Section VI.B
20 within thirty days. A failure to do so will result in an automatic lapse of the '010
21 sunset license.

22

23

24

25

26

27

28

1 The Court orders Broadcom to submit an application for attorney's fees and
2 costs in accordance with this Order within thirty days; Qualcomm may file any
3 objections within twenty days thereafter.

4
5 DATED: August 28, 2008

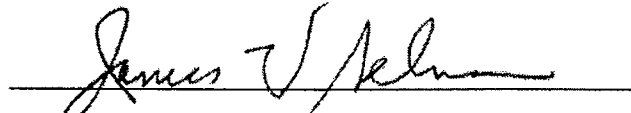
6
7 
8 JAMES V. SELNA
UNITED STATES DISTRICT JUDGE

EXHIBIT 2

1 it cited itself from the Joyner decision,
2 nothing in either Daubert or the federal rules
3 of evidence requires a District Court to admit
4 opinion that is connected to existing data only
5 by the ipse dixit of the expert. Ipse dixit
6 means that it is so because I say it is so.
7 That same precept has been adopted in Pugh
8 against Louisville Ladder, Incorporated in 361
9 federal appendix, and citing a number of cases,
10 including Joyner, holding that the district
11 court discretion includes the discretion to
12 find that there is, citing Joyner, simply too
13 great an analytical gap between the data and
14 the opinion proffered in deciding whether or
15 not the proper evidence is of the ipse dixit
16 variety. In fact, the two text parts in
17 footnote four of that case, Pugh, make quite
18 clear the relationship and the nexus between
19 them.

20 In Bright against American Household
21 Products the fourth circuit pointed out that
22 Daubert aims to prevent expert speculation.
23 And to my knowledge those are the fundamental
24 rules by which rule 702 is to be applied.

25 Now, I have studied the deposition

1 testimony that was proffered, and I have
2 studied the report of Dr. Mangum. And I
3 believe that there is a great difference
4 between Mangum's report and the i4i, as
5 Mr. McDonald pointed out. There was a firm and
6 fixed and rationally-based bench mark that was
7 really unavailable in the i4i case. Here the
8 bench mark is really two litigation
9 settlements. For reasons which make -- I
10 understand that he articulated a reason, but I
11 never did -- I found it quite difficult to
12 understand. Dr. Mangum just threw out the
13 other litigation-related settlements. He just
14 picked the ones that had big numbers in them.

15 And the other three which he mentions in
16 his report he excludes from his analysis. He
17 concludes that the Verian, the Sciquest and
18 Perfect Commerce agreements, which are also
19 settlements that were arrived at, Verian was
20 500,000 plus 2.5 percent running royalty on all
21 sales covered by the patents in suit in excess
22 of 15 million in a calendar year. Sciquest was
23 a 2.4 million-dollar settlement. Perfect
24 Commerce, according to him, was a lump sum
25 payment of \$750,000. And his basis for

1 throwing those out was not an economic basis.
2 His basis for throwing them out was a
3 conclusory ipse dixit pronouncement. And it is
4 that he understood no discovery had occurred,
5 and it was that he understood that due to quick
6 settlements ePlus did not receive information
7 that would allow it to form an understanding as
8 to the amount of accused revenue for any of
9 these parties. As a result, he says, the terms
10 of the agreements do not represent a complete
11 valuation of the specific use of the patents in
12 suit, but rather based on avoidance of
13 litigation. He also -- he says the most that
14 can be said out of those is they provide
15 evidence of the willingness by ePlus to enter
16 into fixed payment and running royalty license
17 agreements. So out of five possible settlement
18 agreements that he could have chosen to include
19 in his base he threw out for non economic
20 reasons the three lowest.

21 There is nothing that I know of that
22 permits an expert to pick and chose in
23 selecting the base in this fashion.

24 Now, the other thing is the base itself of
25 those that were selected are shaky under the

1 THE COURT: Do you think it does or not,
2 Mr. Robertson?

3 MR. ROBERTSON: Your Honor, I am still,
4 quite frankly, reacting to your ruling today,
5 taking it all in and thinking through a lot of
6 issues, and will be thinking about them in the
7 next few days as we prepare to meet with you on
8 Monday, August 16. You know, I am just
9 thinking out loud, Your Honor. So let me --

10 THE COURT: Well, here is a good idea.
11 Don't think out loud. It is a good idea.

12 MR. ROBERTSON: Okay. I think I will
13 reflect. I appreciate that, yes.

14 THE COURT: All right. Now, I am
15 considering that I dealt with these motions in
16 limine. If you think otherwise, you have to
17 get them in front of me in some other way.

18 All right. I think that is taken care of.

19 MR. ROBERTSON: Thank you, sir.

20 THE COURT: Thank you all very much.

21 MR. MERRITT: Thank you, Your Honor. Bye.

22

23 THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT.

24 Gilbert Frank Halasz, RMR

25 Official Court Reporter

EXHIBIT 3

2011.03.25 Hearing - Injunctive Relief 3/25/2011 8:54:00 AM

<p>1 IN THE UNITED STATES DISTRICT COURT 2 FOR THE EASTERN DISTRICT OF VIRGINIA 3 RICHMOND DIVISION 4 ----- 5 ePLUS, INC., : 6 : 7 Plaintiff, : 8 v. : Civil Action 9 : No. 3:09CV620 10 LAWSON SOFTWARE, INC., : 11 : March 25, 2011 12 Defendant. : 13 ----- 14 DAILY COPY 15 COMPLETE TRANSCRIPT OF EVIDENTIARY HEARING 16 BEFORE THE HONORABLE ROBERT E. PAYNE 17 UNITED STATES DISTRICT JUDGE 18 APPEARANCES: 19 Scott L. Robertson, Esq. 20 Jennifer A. Albert, Esq. 21 Michael T. Strapp, Esq. 22 GOODWIN PROCTOR 23 901 New York Avenue, NW 24 Washington, D.C. 20001 25 26 Craig T. Merritt, Esq. 27 CHRISTIAN & BARTON 28 909 E. Main Street, Suite 1200 29 Richmond, VA 23219-3095 30 Counsel for the plaintiff ePlus 31 32 DIANE J. DAFFRON, RPR 33 OFFICIAL COURT REPORTER 34 UNITED STATES DISTRICT COURT 35</p>	<p>1 (The proceedings in this matter commenced at 2 9:30 a.m.) 3 4 THE CLERK: Civil Action No. 3:09CV620, 5 ePlus, Incorporated v. Lawson Software, Incorporated. 6 Mr. Scott L. Robertson, Mr. Craig T. Merritt, 7 Ms. Jennifer A. Albert, Mr. Michael G. Strapp 8 represent the plaintiff. Mr. Daniel W. McDonald, 9 Mr. Dabney J. Carr IV, Ms. Kirstin L. Stoll-DeBell, 10 Mr. William D. Schultz, and Ms. Rachel C. Huey 11 represent the defendant. 12 Are counsel ready to proceed? 13 MR. ROBERTSON: The plaintiff is, Your Honor. 14 MR. McDONALD: Lawson is as well, Your Honor. 15 THE COURT: All right. This is the 16 evidentiary hearing on the issue of an injunction. 17 Is there another firm coming into this case 18 for you-all? 19 MR. McDONALD: The Finnegan firm is involved, 20 Your Honor, but they are not going to be participating 21 in this hearing. They are going to be involved with 22 the appeal primarily, but they wanted to have access 23 to the documents. 24 THE COURT: Oh, okay. 25 Mr. Robertson.</p>
<p>1 APPEARANCES: (Continuing) 2 Daniel W. McDonald, Esq. 3 Kirstin L. Stoll-DeBell, Esq. 4 William D. Schultz, Esq. 5 MERCHANT & GOULD 6 3200 IDS Center 7 80 South Eighth Street 8 Minneapolis, MN 55402-2215 9 Dabney J. Carr, IV, Esq. 10 TROUTMAN SANDERS 11 Troutman Sanders Building 12 1001 Haxall Point 13 P.O. Box 1122 14 Richmond, VA 23218-1122 15 16 Counsel for the defendant Lawson. 17 18 19 20 21 22 23 24 25</p>	<p>1 MR. ROBERTSON: Good morning, Your Honor. 2 If I might, I just have a few brief opening 3 remarks to just sort of put some of the issues in 4 context and then preview for the Court or highlight 5 some of the topics that are going to be addressed 6 today by Mr. Farber's testimony, if that's 7 permissible. 8 THE COURT: All right. 9 MR. ROBERTSON: First, we are here to discuss 10 the supplemental evidence, testimony and documentation 11 that have been provided to the Court and exchanged by 12 the parties since the trial ended that we believe will 13 support the Court's discretion to grant an injunction 14 in this case to prevent the ongoing infringement of 15 ePlus' patents. 16 We certainly don't want to be here today, and 17 I know the Court doesn't want to retry the case, or 18 reargue a number of the issues involving hotly 19 contested issues that are before the Court. 20 That said, there will be some additional 21 details concerning evidence that did come out that we 22 think would be important for the Court to consider. 23 I'd just like to highlight Section 154 of the 24 Patent Act. Your Honor, the only right conferred upon 25 a patent owner under the Patent Statute is the right</p>

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<p style="text-align: right;">217</p> <p>1 THE WITNESS: Correct.</p> <p>2 THE COURT: Okay. That's fine.</p> <p>3 THE WITNESS: But you need to carry the right</p> <p>4 amount of stock, not overstock or understock,</p> <p>5 otherwise you add far more cost to the health care</p> <p>6 system than already exists.</p> <p>7 THE COURT: That's hard to do.</p> <p>8 THE WITNESS: It's very hard to do.</p> <p>9 BY MR. McDONALD:</p> <p>10 Q So with respect to tracking, Mr. Hager --</p> <p>11 THE COURT: I just think you're overblowing</p> <p>12 it. You need to be accurate in what you're saying,</p> <p>13 and it's important to know what actually takes place</p> <p>14 as opposed to the inflated view of things that takes</p> <p>15 place. And if you sell an inflated view that I can't</p> <p>16 buy, I'm just going to reject the testimony in its</p> <p>17 entirety because you let him get on the witness stand</p> <p>18 and suggest that they can't conduct an operation</p> <p>19 without this system and that the whole place will shut</p> <p>20 down in the middle of an operation without this</p> <p>21 system, and that isn't what's at stake here.</p> <p>22 And if that's the way you're going to try to</p> <p>23 sell the issue, then what I'm going to do is say I</p> <p>24 just don't buy any of it. And that's the risk you run</p> <p>25 from overstating your case.</p>	<p style="text-align: right;">219</p> <p>1 Q You indicated the amount of time it would take to</p> <p>2 go to an alternative system. Do you have an estimate</p> <p>3 as to how long it would take a customer to actually</p> <p>4 select and verify and implement a system that would</p> <p>5 replace the Lawson eProcurement functionality?</p> <p>6 A It's entirely up to the customer as to how long it</p> <p>7 would take to select, but from an implementation</p> <p>8 perspective knowing how complex those implementations</p> <p>9 are, and I don't believe it's overstating it to say it</p> <p>10 would be nine months probably on average.</p> <p>11 Q Is that within the range Mr. Farber provided</p> <p>12 today?</p> <p>13 A He provided 30 days to six months to potentially</p> <p>14 longer. Because of the very complex health care</p> <p>15 organization we run, I believe it would fall in the</p> <p>16 typically longer.</p> <p>17 I do say that with some level of expertise. We</p> <p>18 have 277 requisition self service health care only</p> <p>19 customers that represent 2500 different hospitals,</p> <p>20 which is about a third of the hospitals in the United</p> <p>21 States. We do have a lot of experience.</p> <p>22 THE COURT: You have a lot of business and</p> <p>23 you have a lot of infringement, according to the jury.</p> <p>24 So the question I have to deal with is how to deal</p> <p>25 with it.</p>
<p style="text-align: right;">218</p> <p>1 So try to confine it to what actually</p> <p>2 happens. That's what's important anyway. And that's</p> <p>3 really what he knows most about, I would assume.</p> <p>4 MR. McDONALD: Fair enough.</p> <p>5 BY MR. McDONALD:</p> <p>6 Q Can we talk, Mr. Hager, about the tracking that</p> <p>7 your system does for those medical supplies for</p> <p>8 operations? Can you walk us through how the Lawson</p> <p>9 system is used to track, for example, the supplies</p> <p>10 that are used for surgery in a hospital?</p> <p>11 A Again, at the beginning of the process is the</p> <p>12 inventory management and inventory counting that is</p> <p>13 done. And that all gets loaded up into the system</p> <p>14 where somebody looks at the system and determines in</p> <p>15 what hospitals they need to have which materials</p> <p>16 purchased, so that they have the adequate in stock</p> <p>17 equipment.</p> <p>18 And then they run those through the purchase and</p> <p>19 were able to follow it through the process to the</p> <p>20 loading dock, to the invoice matching, and ultimately</p> <p>21 follow that device all the way into the operating</p> <p>22 room.</p> <p>23 Q So your system actually tracks the inventory used</p> <p>24 in surgery all the way into the operating room?</p> <p>25 A Correct.</p>	<p style="text-align: right;">220</p> <p>1 THE WITNESS: I understand.</p> <p>2 THE COURT: Now, if you're shut down and a</p> <p>3 government agency comes in and finds that you're</p> <p>4 committing fraud and shuts down all your operations to</p> <p>5 do a search and seizure, how is somebody, for example,</p> <p>6 who's using your system going to operate? Do you know</p> <p>7 that?</p> <p>8 THE WITNESS: On day one, they would simply</p> <p>9 operate at risk.</p> <p>10 THE COURT: They would find a way is what</p> <p>11 would happen.</p> <p>12 THE WITNESS: For money, yes, they would.</p> <p>13 THE COURT: Of course, it would. Of course,</p> <p>14 it would.</p> <p>15 Now, suppose that we had a terrible</p> <p>16 catastrophe that wiped out where you have most of your</p> <p>17 support system. Are the hospitals going to be able to</p> <p>18 find somebody to help them straighten out and track</p> <p>19 what's going on and be able to provide surgeries to</p> <p>20 people; yes or no?</p> <p>21 THE WITNESS: There's always a way.</p> <p>22 THE COURT: There's a way. The question is:</p> <p>23 How much, right?</p> <p>24 THE WITNESS: Correct.</p> <p>25 THE COURT: And how much inconvenience?</p>

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<p style="text-align: right;">261</p> <p>Hager - Redirect</p> <p>1 THE WITNESS: They don't at the beginning.</p> <p>2 THE COURT: After you ask the questions, you could</p> <p>3 find out if it was RSS, for example, couldn't you?</p> <p>4 THE WITNESS: We could.</p> <p>5 THE COURT: And then you could say to the customer,</p> <p>6 sorry, we can't do that?</p> <p>7 THE WITNESS: We could once we've narrowed it down to</p> <p>8 RSS.</p> <p>9 THE COURT: But you have to go through all that.</p> <p>10 THE WITNESS: We would, yes.</p> <p>11 Q Would you be able to narrow it down that way while you're</p> <p>12 still on the phone with the customer in all instances, or</p> <p>13 sometimes, or what?</p> <p>14 A Sometimes it would be while we're on the phone. Other</p> <p>15 times it would likely be weeks and potentially months.</p> <p>16 Q Why is that?</p> <p>17 A Because it's a very complex system. Sometimes defects,</p> <p>18 whether they're intermittent or what have you, you have to</p> <p>19 really dig in there and try to identify what the root cause is.</p> <p>20 We have many calls in our call center that have been open for</p> <p>21 months because we haven't been able to identify the location of</p> <p>22 the issue. That's pretty common in the software industry.</p> <p>23 MR. McDONALD: Any other questions that you have on</p> <p>24 that, Your Honor?</p> <p>25 Q You were asked about the cost increase for your customers</p>	<p style="text-align: right;">263</p> <p>Hager - Redirect</p> <p>1 implementation of our RSS and pull it out and put something</p> <p>2 else in, you know, probably the simplest would be three months,</p> <p>3 but I think on average for our hospitals, I bet you would it</p> <p>4 probably be closer to nine months because of the complexities</p> <p>5 of the hospital.</p> <p>6 Q You gave me the time. I was actually asking -- maybe you</p> <p>7 were thinking of time cost, but I think the question is</p> <p>8 actually going to the monetary cost.</p> <p>9 A Yeah, that's going to run somewhere north of 300,000, 3-</p> <p>10 to 500,000 probably for that length of time. Maybe up to</p> <p>11 750,000 on average. Some will be greater than a million.</p> <p>12 THE COURT: Does it cost that much to put RSS in?</p> <p>13 THE WITNESS: Some of our projects -- again, we put</p> <p>14 RSS in in conjunction with everything else, but it's so tied</p> <p>15 into the work flow approvals, and our work flow approvals are</p> <p>16 based off everything that happens in RSS, so pulling RSS out</p> <p>17 means you are rebuilding all those work flow approvals to go</p> <p>18 with whatever new tool you are bringing in, and that's really</p> <p>19 where the complication comes. I wish it didn't take this long,</p> <p>20 but it does.</p> <p>21 Q And finally, Mr. Robertson asked you about the advantages</p> <p>22 of selling the full suite, and I want to clarify, if the</p> <p>23 customer already has an SAP ERP suite, for example, do you have</p> <p>24 an advantage over ePlus in selling to a customer like that</p> <p>25 that's looking for eProcurement?</p>
<p style="text-align: right;">262</p> <p>Hager - Redirect</p> <p>1 that have RSS if they had to make a change; do you recall that?</p> <p>2 A Yes.</p> <p>3 Q Do you have an estimate as to how much it would cost</p> <p>4 your -- let's take a hospital, how much money it would actually</p> <p>5 cost them to make a change or not?</p> <p>6 MR. ROBERTSON: Objection, lack of foundation, Your</p> <p>7 Honor, and I think it's outside the scope of my cross-examine.</p> <p>8 THE COURT: I think it's within the scope of your</p> <p>9 cross-examination. I don't know whether he -- I think he's</p> <p>10 asking a foundational question, that is whether he knows or has</p> <p>11 any basis to know what the cost is.</p> <p>12 MR. ROBERTSON: Also, certainly there was no</p> <p>13 documentation produced in the supplemental period with respect</p> <p>14 to the cost issue.</p> <p>15 MR. McDONALD: But he asked about it, so I thought we</p> <p>16 should flush that out. I'll ask the foundational question.</p> <p>17 Q Mr. Hager, from your experience, do you have an idea of</p> <p>18 how much it would cost, for example, a hospital to make that</p> <p>19 change away from RSS?</p> <p>20 A I do have some experience with that, yes.</p> <p>21 Q Based on your experience, what would you believe to be the</p> <p>22 likely cost to a hospital for that change?</p> <p>23 A For a hospital, the hospital -- very large hospitals I</p> <p>24 think would be more expensive than some of the non-hospital RSS</p> <p>25 customers we have, so if I were to take the simplest</p>	<p style="text-align: right;">264</p> <p>Hager - Redirect</p> <p>1 A No. As a matter of fact, a disadvantage, because our RSS</p> <p>2 and Punchout won't work with an SAP suite. We wouldn't even</p> <p>3 attempt to make that sell.</p> <p>4 Q So when is it that Lawson would have actually have some</p> <p>5 advantage for offering the full suite that Mr. Robertson was</p> <p>6 asking about?</p> <p>7 MR. ROBERTSON: Your Honor, I didn't ask -- I asked</p> <p>8 him about whether or not having that full suite put my client</p> <p>9 at a disadvantage.</p> <p>10 THE COURT: Sustained.</p> <p>11 Q So in that situation then, can you explain what type of</p> <p>12 customer would be the customer --</p> <p>13 THE COURT: What situation?</p> <p>14 Q Where Lawson would have that advantage or ePlus would have</p> <p>15 the disadvantage to Lawson, what specific market situation</p> <p>16 might that be?</p> <p>17 A As was mentioned, when we're selling the entire integrated</p> <p>18 suite, it's obviously because the customer wants a fully</p> <p>19 integrated suite, so that would become our competitive</p> <p>20 advantage. I should also mention that, you know, our RSS --</p> <p>21 MR. ROBERTSON: Objection, Your Honor. He's</p> <p>22 responded to the question.</p> <p>23 THE COURT: Sustained.</p> <p>24 THE WITNESS: Actually, it's a follow-on to the --</p> <p>25 THE COURT: No, that's enough.</p>

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1 here to the public interest has been greatly exaggerated. What
 2 we have in the record are two declarations from two hospital
 3 workers who essentially say that this is basically a monetary
 4 inconvenience and would be, you know, disruptive, but nobody
 5 says -- the Court, I think, explored during examination its
 6 questions of the witness that, you know, the sky is going to
 7 fall here, and so that's all we have with respect to that other
 8 than attorney argument.

9 And there are other ways to handle this, Your Honor.

10 THE COURT: You have Mr. Hager's testimony.

11 MR. ROBERTSON: And he was basically addressing,
 12 first of all, the money that might be involved, and there are
 13 indemnifications provisions that Lawson has. It's chosen to
 14 build its business upon a foundation of infringement. It can't
 15 turn around and say, we shouldn't be enjoined now because we've
 16 been too effective infringers, and the case law says that as
 17 well. But there are options for Your Honor, one of which is
 18 what's been phrased the sunset provision which means the
 19 injunction could enter, but the Court could say it's not going
 20 to be effective with perhaps the hospitals for 90 days,
 21 something along those lines such that they can, with as minimal
 22 disruption as possible, replace the infringing software.

23 THE COURT: Yes, I understand.

24 MR. ROBERTSON: So we'll be addressing that in the
 25 briefing as well. Thank you.

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1 MR. McDONALD: Your Honor, I'm not sure where we're
 2 at. I've been asked to point out, in my self interest as well,
 3 we have a 7:20 flight. Is it something that's going to end
 4 soon, or do you want us --

5 THE COURT: Goodbye. I'm thinking about a slight
 6 moving of the date of the hearing because of the length of what
 7 you all have done on this one, but I won't do it, so go catch
 8 your plane.

9 MR. McDONALD: Thank you, Your Honor.

10 THE COURT: All right.

11

12 (End of proceedings.)

13

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15 We certify that the foregoing is a correct transcript
 16 from the record of proceedings in the above-entitled matter.

17

18

19 /s/

P. E. Peterson, RPR

Date

20

21

/s/

22 Diane J. Daffron, RPR

Date

23

24

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of February, 2012, I will electronically file the foregoing

**DECLARATION OF SRIKANTH K. REDDY AND EXHIBITS 1, 2 AND 3 IN SUPPORT
OF ePLUS INC.'s OPPOSITION TO LAWSON'S MOTION TO STRIKE THE
EXPERT OPINIONS OF DR. KEITH UGONE**

with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) via email to the following:

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